Office-Supreme Court, U.S.
FILED
OCT 18 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 292

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner*,

v.

OVERNITE TRANSPORTATION COMPANY, *Respondent*.

PETITIONER'S PETITION FOR REHEARING

EDWARD BENNETT WILLIAMS
1000 Hill Bldg.
Washington 6, D. C.
of Counsel

DAVID PREVIANT
511 Warner Bldg.
Milwaukee 3, Wisc.

HERBERT S. THATCHER
1009 Tower Bldg.
Washington 5, D. C.

EDWIN PEARCE
1642 Bank of Ga. Bldg.
Atlanta 3, Ga.
Counsel for Petitioner.

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I

Denial of the petition herein leaves standing a precedent-making application of Section 303 of the National Labor Relations Act which can well debilitate the labor movement. Not even the strongest of unions can long survive the exaction of over $300,000.00 for the peaceful exercise of rights guaranteed by both the federal statutes and the federal Constitution, and that is precisely what the courts of North Carolina have sanctioned in this case.

Petitioner's original petition stressed the necessity for a proper federal interpretation of Section 303. Respond-

ent's brief in opposition (an answer to which had been prepared and was available for filing on the day the Court denied the petition herein) and further consideration of the issues indicates that prime emphasis should have been placed on the subversion of federally protected rights flowing from the decisions below. Further, it should be emphasized that this case presents a legal and not a factual question, the facts being undisputed in the record. Finally, and most important, this case involves a conflict between the several circuit courts of appeal—a substantial ground for review by this Court not stressed in the original petition.

The basic issue in this case can be sharpened as follows:

> **Whether a federally protected right is impaired and Section 303 of the National Labor Relations Act is misapplied by the refusal of the state courts of North Carolina, in an action for damages brought to them under that Section, to require the separation and elimination of damages attributable to federally protected labor activities from those attributable to labor activities not so protected.**

The right so protected is the right peacefully to engage in primary picketing of an employer against whom a lawful strike has been called. No matter how this case is viewed, petitioner and its members have been penalized for the exercise of that right, for in one degree or another, damages attributable solely to peaceful primary picketing carried on pursuant to a legitimate and peacefully conducted primary strike have admittedly been assessed against petitioner.[1] As long as that penalty stands the possibility exists that similar penalties can be imposed in

[1] Respondent's Brief, page 15, states: "Obviously a portion of the damages were occasioned by what might be termed primary aspects of the strike." That damages resulting from legal as well as illegal activity were assessed is conclusively shown by the action of the jury which, notwithstanding the trial court's instructions, returned a verdict for the exact amount of all of the damages which respondent had proved to be a result of the entire strike including the peaceful picketing of respondent's own premises.

the future so that free exercise of the right to strike and peacefully picket, is necessarily restrained. No restraint, previous or present, was contemplated by Congress when it established employee rights under Sections 7 and 13 of the Act, and this Court has heretofore tolerated no such restraint, constitutional rights also being involved. *NLRB* v. *Teamsters Local 639 (Curtis Bros.)*, 362 U. S. 274 (1960); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

Section 303 is subject to unusually great uncertainties, since that Section depends upon the interpretation and application of the most frequently litigated union unfair labor practice provision of the Act—Section 8(b)(4) (commonly known as the secondary boycott section). Indeed, mere changes in the composition of the Board have resulted in changes in the meaning afforded to Section 8(b)(4), and consequently to Section 303. This is well illustrated in the present case where the roving, or follow-the-truck, picketing, the sole conduct alleged by the respondent to be illegal, has from time to time, as it is now, been held to be entirely proper, the legality being dependent upon the composition of the Board or the court before whom the issue is brought. Cf. *Sales Drivers* v. *NLRB (Campbell Coal Co.)* 292 F2d 514 (D.C. Cir 1955), cert. den. 351 U.S. 972 (1956); *NLRB* v. *Teamsters Local 968 (Otis Massey Co.)*, 225 F2d 205 (5th Cir. 1955), cert. den. 350 U.S. 914 (1955). A labor organization which has knowledge beforehand that it may be held responsible for the heavy damages which might well result from lawful strike and picketing activities if any illegal activities are also found to have taken place, would hesitate and in most instances refrain from engaging in a strike at all. And this is to say nothing of the strong encouragement to extensive litigation which will follow if the precedent established below is permitted to stand.

Petitioner's contention is simply that in any Section 303 case, the failure either of the plaintiff or of the court or of the jury to sever damages flowing from protected labor activity from damages flowing from unprotected labor activity operates not only as a perversion of the statute under which suit has been brought, but also as a basic

impairment of a federal right. Such a contention is far different from an assertion that damages are excessive, that the instructions to the jury were inadequate or that there were errors in procedure. (See respondent's brief, pages 7, 8.)[2]

That the amount of damages in a particular case which may be attributable to the protected activity may, unlike the situation here, be small or even negligible in comparison to the damages attributable to the illegal activity is beside the point and does not detract from the basic principle of the right to engage in a protected activity free from prior restraint or subsequent penalty. Likewise with any alleged difficulty in segregating the one from the other; if as here such segregation is at all possible, certainly the obligation to do so is on the plaintiff who has invoked the statute and who is entitled to recover only those damages which can be proven to constitute a violation of Section 303. Under that Section, as in all civil litigation, the burden of proof is on the plaintiff.

In the present case, contrary to what respondent states in its Brief in Opposition, it so happens that the damages attributable to the exercise of legal labor activity are severable, and also are in a very considerable amount. This can be quickly demonstrated:

1. Respondent, while asserting (Brief in Opposition page 14) that only 64 of Overnite's 1,500 terminal employees respected the primary picket lines at these terminals and that this resulted in only "a very minimum of inconvenience" and little damage, does not deny, nor could it, that the action of other employees of other carriers to

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[2] So far as procedure is concerned petitioner, as indicated in its petition herein, raised the issue of the intermingling of damages first by objection to introduction of evidence of damages resulting from legal picketing, second by objection to the inadequacy of the trial court's instructions on this issue, and third by appropriate motions to set aside the jury's verdict. Notwithstanding the foregoing, the courts below refused petitioner any relief.

respect those same picket lines resulted in considerable inconvenience and damage. The exact degree of this was testified to by Mr. P. S. Simmons, general manager and cost analyst for the company and the sole witness testifying to the damage suffered by respondent. Asked the cost to the company "of picking up freight from interchange carriers and bringing it to your terminal[s] during the period of this strike" he replied that "not including Ashville, it was costing us $45,000.00 a month" due to the necessity "to provide equipment and additional personnel." (R. 240). Forty five Thousand Dollars a month for 4½ months, the duration of the strike, amounts to $202,500.00, a not inconsiderable sum.[3]

2. The other element of damage claimed by respondent was that occasioned by the refusal of employees of other employers working at other neutral or non-Overnite terminals or warehouses to load or unload or check Overnite trucks and freight at such terminals. It is admitted that there was no so-called roving or follow the truck picketing at any of these neutral premises in at least 5 of the major cities in which Overnite operated (Atlanta, Savannah, Columbia, Charleston and Richmond) and there was no evidence of any neutral employee reaction at any of these

[3] On R. 243 the same witness said "our company having [had] to pick up this 20-million-odd-pounds of freight that was normally brought to our terminal by connecting lines and employees." At R. 213, Mr. Walter D. Cross, general manager of the respondent's Atlanta terminal, testified that during the entire period of the strike not a single load of interchange freight was delivered to the Atlanta terminal and on R. 223 and 224, Mr. A. M. Price, Vice-President of Operations for respondent, testified that because of the strike the company had to "deliver the freight that was destined to other carriers, and we had to pick up the freight the other carriers normally brought to us" and that this required hiring 125 additional employees and leasing 17 additional trailers at $167.00 apiece per month, and that these 125 employees were scattered around about 10 or 11 different terminals, "I think the largest number at any one terminal was Atlanta which was about 30." (R. 225 & 226.)

cities except Atlanta, and even at Atlanta, the evidence disclosed only individual refusals of neutral employees to handle Overnite freight which, for all the record shows, were solely the result of individual choice in the matter after receiving knowledge of the strike. Evidence such as this standing alone does not constitute a violation of Section 303; the cases cited by respondent on page 14 of its brief all involved and required other acts of inducement by the union. Indeed the refusal of neutral employees to handle the struck freight was in the exercise of their legal right given them under the bargaining contracts covering their work which permitted them to refuse to handle freight interchanged with a carrier against whom a strike was being conducted. See respondent's brief, page 11. Such clauses were entirely legal at the time of the strike, at least where, as here, there was no showing that each of the numerous secondary employers who were parties to the agreements containing these clauses had each repudiated such clauses or had done other than acquiesce in their use. *Local 1976, Carpenters, v. NLRB (Sand Door and Plywood Co.)*, 357 U.S. 93 (1958). Thus no damages sustained in any of those five cities were shown to be the result of any violation of Section 303.

The basic error in respondent's whole approach to this case is in considering the strike and the damage caused by the strike together with any and all activities carried on in connection with the strike as "one ball of wax" or "one package."* Of the many thousands of secondary boycott

* R. 225, 226. Q. Now Mr. Simmons, in the preparation of the figures that you brought to present in this hearing, you did not therefore look to see whether or not there was some locations where there was picketing only in front of Overnite as distinguished from picketing elsewhere so that the so-called damage, if any, might be differentiated as to where picketing was called primary and was called secondary, did you?

A. Well, as I saw this thing as I viewed it, it was all one ball of wax.

Q. So the only thing that you did was just took it for granted that you had a ball of wax, but so far as any complete investigation

cases processed by the National Labor Relations Board each year, most, if not all, involve a primary strike as well. Under the "one package" approach which the North Carolina courts have permitted respondent to make in this case, all of these could serve as the basis for a heavy damage award; at the very least, the refusal to require that proof of damages be limited solely to that flowing from the illegal conduct, with the inevitable result, as here, of a heavy damage showing, will greatly encourage Section 303 litigation.[5] Guidelines which safeguard federally protected labor activities of labor organizations apparently are not forthcoming from the state courts which have refused even to discuss the issue; only this Court can provide the necessary protection. That under the record in this case a union can be assessed damages in the amount of $363,000.00, a great portion of which is obviously attributable only to the effects of lawful primary picketing is not only shocking and unconscionable but operates to pervert the purpose of Section 303 and to severely impair the exercise by unions and their members of rights protected under the federal statute and under the federal Constitution. Surely the refusal of the North Carolina courts to afford relief in this situation warrants the intervention of this Court. The implications of this case have heavy impact throughout the entire labor movement.

II

The decision of the Ninth Circuit in *Carpenters Local 131 v. Cisco Construction Co.*, 266 F2d 365 (9th Cir. 1959), cert. den. 361 U.S. 828, relied on by the courts below, is in direct conflict with the decision of the Sixth Circuit in *Teamsters*

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to segregate any damages here, as to primary or secondary picketing, you had no information on that at all, is that right?

A. No, I have not separated them.

See also R. 262.

[5] Since the filing of the Petition herein, the litigation referred to in footnote 6 thereof has resulted in a damage award against petitioner in the amount of $224,000.00.

Local 984 v. Humko Co., 287 F2d 231 (6th Cir. 1961), cert. den. 366 U.S. 962, the decision of the Seventh Circuit in *Milwaukee Plywood v. NLRB*, 285 F2d 325 (7th Cir. 1960), and the decision of the District of Columbia Circuit in *Chauffeurs Local 175 v. NLRB (McJunkin Corp.)*, 294 F2d 261 (D. C. Cir. 1961). *Cisco* supports the "one ball of wax" theory; the other circuits repudiate that doctrine and the sweeping of the good with the bad, and stress the necessity for the separation of the legal from the illegal in the application of the Taft-Hartley Act. This direct conflict in doctrine can be resolved only by this Court.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court reconsider its previous denial of the Petition for Writ of Certiorari requested in this case and grant such request.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
1000 Hill Building
Washington 6, D. C.
of Counsel

DAVID PREVIANT
511 Warner Building
Milwaukee 3, Wisc.

HERBERT S. THATCHER
1009 Tower Building
Washington 5, D. C.

EDWIN PEARCE
1642 Bank of Georgia Bldg.
Atlanta 3, Ga.
Counsel for Petitioner.

CERTIFICATE OF COUNSEL PURSUANT TO RULE 58

Herbert S. Thatcher, one of the counsel for petitioner in the above matter, hereby certifies that this Petition for

Rehearing is presented in good faith and not for delay and is restricted to matters not previously brought to this Court's attention. The undersigned counsel has been authorized by counsel for respondent to state that the filing of this Petition for Rehearing will not be objected to on the ground of delay.

HERBERT S. THATCHER